

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

TAMMY DOERING

Claimant

VS.

EVANGELICAL LUTHERAN GOOD

SAMARITAN SOCIETY, d/b/a/ MINNEAPOLIS

GOOD SAMARITAN CENTER

Respondent

AND

CONSTITUTION STATE SERVICE COMPANY

Insurance Carrier

Docket No. 187,307

ORDER

Claimant requested review of the Award dated March 24, 1995, entered by Administrative Law Judge George R. Robertson.

APPEARANCES

Claimant appeared by her attorney, Patrik W. Neustrom of Salina, Kansas. Respondent and its insurance carrier appeared by their attorney, C. Stanley Nelson of Salina, Kansas.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award.

ISSUES

The Administrative Law Judge awarded claimant permanent partial general disability benefits for a 10 percent whole body functional impairment. Claimant requested this review and contends that she is entitled to a work disability. The only issue on this review is the nature and extent of claimant's disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds as follows:

The Award entered by the Administrative Law Judge should be modified.

The parties stipulated that claimant sustained a work-related accident on August 31, 1993. The Administrative Law Judge held that respondent provided claimant with an accommodated job within her permanent restrictions after she recovered from that accident. The Administrative Law Judge also held that claimant refused without justification to perform that job and, thus, limited claimant's permanent partial general disability benefits to the functional impairment rating pursuant to the rationale of Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), rev. denied 257 Kan. 1091 (1995).

The Appeals Board has held on numerous occasions that the public policy rationale cited in Foulk is similarly applicable to accidents occurring on and after July 1, 1993. In Foulk, the Court of Appeals said:

"Construing K.S.A. 1988 Supp. 44-510e(a) to allow a worker to avoid the presumption of no work disability by virtue of the worker's refusal to engage in work at a comparable wage would be unreasonable where the proffered job is within the worker's ability and the worker had refused to even attempt the job. The legislature clearly intended for a worker not to receive compensation where the worker was still capable of earning nearly the same wage. Further, it would be unreasonable for this court to conclude that the legislature intended to encourage workers to merely sit at home, refuse to work, and take advantage of the workers compensation system."

If the facts establish respondent did provide claimant with an appropriate accommodated job paying a comparable wage, claimant should be limited to her functional impairment rating. If the job provided by respondent was not appropriate or other circumstances would justify claimant's refusal to perform that job, claimant should be entitled to the higher of work disability or functional impairment. See K.S.A. 44-510e.

Claimant sustained a work-related back injury when she was helping to lift an obese woman out of bed. Claimant first consulted her family physicians, Dr. Kermit Wedel and

Dr. Kenneth Wedel, on August 31, 1993, for treatment of the back injury. Dr. Kermit Wedel, who is a board-certified family practitioner, testified that his office saw claimant on several occasions in September and October 1993 before referring claimant to board-certified neurosurgeon Ali B. Manguoglu, M.D., because of tingling in claimant's legs. Dr. Kermit Wedel testified that claimant had disc problems at three levels of the lumbar spine, two small possible herniations, spinal stenosis, spina bifida occulta, and a lumbar sprain. He also confirmed that claimant had been treated at his clinic for several years before this work-related accident and did not have any significant back problems during that time. Dr. Wedel testified that he agreed with the restrictions Dr. Manguoglu placed upon claimant as set forth below. He also testified that he did not believe claimant should attempt to return to work at the nursing home because of the unpredictability of activity associated with nursing home employment. Dr. Wedel indicated that he is familiar with respondent's nursing home as he has visited the facility quite often to treat patients.

Dr. Manguoglu testified that he first saw claimant in November 1993. After conducting an examination and reviewing x-rays and an MRI scan, Dr. Manguoglu diagnosed Grade I spondylolisthesis, spina bifida occulta (congenital deformation of the lower part of the lumbar spine), degeneration of lumbar discs at the L3-4, L4-5, and L5-S1 intervertebral levels, focal herniations at the L4-5 and L5-S1 levels, and lumbar sprain. Although the spondylolisthesis and disc degeneration probably preexisted the August 1993 accident, Dr. Manguoglu believes the disc herniations and lumbar sprain were directly related to that accident. Based upon his evaluation, Dr. Manguoglu did not believe that surgery would benefit claimant at that time, although there was a good possibility it will be required in the future. According to Dr. Manguoglu's interpretation of the MRI scan, the disc herniations were not large enough to warrant surgery and were not pressing upon nerve roots.

Dr. Manguoglu restricted claimant to approximately 25 pounds of lifting and carrying on an occasional basis, restricted claimant from repetitive forward bending and twisting, and suggested that claimant alternate sitting, standing, and walking. Utilizing the AMA Guides to the Evaluation of Permanent Impairment, Fourth Edition, Dr. Manguoglu gave claimant a 10 percent whole body functional impairment rating. Utilizing the Third Edition of the AMA Guides, Dr. Manguoglu gave claimant between a 6 and 7 percent whole body functional impairment rating and indicated the percentage should be increased as indicated by range of motion testing. It appears Dr. Manguoglu believes the 10 percent whole body functional impairment rating is reasonable even under the Third Edition to the AMA Guides.

Dr. Manguoglu testified he is familiar with the respondent's nursing home and believes claimant would be at risk of further injury if a patient would fall or if a patient would suddenly need claimant's help. Dr. Manguoglu generally agrees with Dr. Wedel that it is not practical for claimant to be working around nursing home patients as she would be placed in emergency situations and she could not avoid violating her restrictions.

Based upon Dr. Wedel's and Dr. Manguoglu's testimony, the Appeals Board finds that the accommodated job of activities director which respondent provided to claimant was not appropriate considering claimant's post-injury physical abilities and the inherent danger connected with the patient care surrounding that job. Therefore, the public policy rationale pronounced in the Foulk decision does not apply to the facts of this case.

Because hers is an "unscheduled" injury, the computation of permanent partial disability benefits is governed by K.S.A. 44-510e which provides in part:

"The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. "

Claimant prepared a list of 58 work tasks that she had performed in the 15-year period preceding the date of accident. Dr. Manguoglu reviewed that list and concluded that claimant could probably perform 16 of the 58 tasks or approximately 28 percent. The Appeals Board finds that testimony persuasive.

At the time of regular hearing in November 1994, claimant had applied for employment at several companies and institutions but was unsuccessful in finding work. Therefore, the difference between claimant's pre-injury stipulated average weekly wage of \$260.85 and her post-injury average weekly wage is 100 percent.

As required by K.S.A. 44-510e, the Appeals Board averages the 72 percent task loss with the 100 percent wage loss and finds that claimant has an 86 percent work disability for which she is entitled to receive permanent partial disability benefits.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge George R. Robertson dated March 24, 1995, should be, and hereby is, modified; that claimant is entitled to receive permanent partial general disability benefits for an 86% work disability.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Tammy Doering, and against the respondent, Minneapolis Good Samaritan Center, and its insurance carrier, Constitution State Service Company, for an accidental injury which occurred August 31, 1993, and based upon an average weekly wage of \$260.85 for 26.57

weeks of temporary total disability compensation at the rate of \$173.91 per week or \$4,620.79, followed by 346.95 weeks of permanent partial compensation at the rate of \$173.91, per week or \$60,338.07, for an 86% permanent partial general disability, making a total award of \$64,958.86.

As of October 31, 1996, there is due and owing claimant 26.57 weeks of temporary total disability compensation at the rate of \$173.91 per week or \$4,620.79, followed by 138.72 weeks of permanent partial compensation at the rate of \$173.91 per week in the sum of \$24,124.80 for a total of \$28,745.59, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$36,213.27 is to be paid for 208.23 weeks at the rate of \$173.91 per week, until fully paid or further order of the Director.

The remaining orders of the Administrative Law Judge are hereby adopted by the Appeals Board as its own to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of November 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Patrik W. Neustrom, Salina, KS
C. Stanley Nelson, Salina, KS
Administrative Law Judge, Salina, KS
Philip S. Harness, Director